

1 **ROBERT D. DENNISON, ESQ., Bar No. 127498**  
2 **GARY L. GREEN, ESQ., Bar No. 82218**  
3 **HARRIS, GREEN & DENNISON**  
4 **A Professional Corporation**  
5 5959 West Century Boulevard, Suite 1100  
Los Angeles, California 90045  
Tel: (310) 665-8656 Fax: (310) 665-8659  
robertdennison@h-glaw.net  
garygreen@h-glaw.net

6 Attorneys for Defendant, Counter-Claimant and Cross-Claimant,  
7 **WESTCHESTER FIRE INSURANCE COMPANY**

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 LENSRAFTERS, INC.; and EYEXAM OF )  
12 CALIFORNIA, INC., )

13 Plaintiffs, )

14 vs. )

15 LIBERTY MUTUAL FIRE INSURANCE )  
16 COMPANY; EXECUTIVE RISK SPECIALTY )  
17 INSURANCE COMPANY; UNITED STATES )  
18 FIRE INSURANCE COMPANY; MARKEL )  
19 AMERICAN INSURANCE COMPANY; and )  
20 WESTCHESTER FIRE INSURANCE COMPANY, )

21 Defendants. )  
22  
23  
24  
25  
26  
27  
28

29 AND RELATED COUNTER AND CROSS- )  
30 CLAIMS )  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

CASE NO. C-07-2853 SBA

**E-FILING**

**WESTCHESTER FIRE INSURANCE  
COMPANY'S MOTION TO DISMISS THE  
SECOND AND THIRD CLAIMS FOR  
RELIEF OF PLAINTIFFS' FIRST  
AMENDED COMPLAINT  
[F.R.C.P. Rule 12(b)(6)]**

Date: January 29, 2008

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

///

# TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION .....	1
MEMORANDUM OF POINTS AND AUTHORITIES .....	1
1. STATEMENT OF FACTS .....	1
2. ISSUES TO BE DECIDED .....	2
3. PERTINENT FACTUAL ALLEGATIONS .....	2
4. DISCUSSION .....	5
A. No Duty To Indemnify Arises Under An Excess Policy Unless And Until All Applicable Underlying Insurance Has Been Exhausted By Payment Of Settlements Or Judgments .....	5
B. LensCrafters Fails To Allege Breach of Any Present Contractual Duty By Westchester Fire .....	8
C. LensCrafters Fails To Allege The Requisite Element of Actual Damages .....	9
D. LensCrafters Fails To Allege A Claim For Breach of The Duty To Settle .....	10
E. Granting LensCrafters Further Leave To Amend Would Be Futile .....	12
5. CONCLUSION .....	12

## TABLE OF AUTHORITIES

Page

## FEDERAL CASES

<i>County of Santa Clara v. U.S.F. &amp; G. Co.</i> , 868 F.Supp. 274 (N.D. Cal. 1994) .....	7, 10
<i>Iolab Corp. v. Seaboard Sur. Co.</i> , 15 F.3d 1500 (9th Cir. 1994) .....	6-7
<i>Mercado v. Allstate Ins. Co.</i> , 340 F.3d 824 (9th Cir. 2003) .....	11
<i>Moody v. Liberty Life Assurance Co.</i> , 2007 U.S. Dist. LEXIS 32837 (N.D. Cal., April 19, 2007) .....	2
<i>Pacific Employers Ins. Co. v. Domino's Pizza, Inc.</i> , 144 F.3d 1270 (9th Cir. 1998) .....	6
<i>Pareto v. FDIC</i> , 139 F.3d 696 (9th Cir. 1998) .....	3, 4
<i>Shwarz v. United States</i> , 234 F.3d 428 (9th Cir. 2000) .....	3
<i>Transphase Systems, Inc. v. So. Cal. Edison Co.</i> , 839 F.Supp. 711 (C.D. Cal. 1993) .....	4

## STATE CASES

<i>Brandt v. Superior Court</i> , 37 Cal.3d 813 (1985) .....	11
<i>Community Redevelopment Agency v. Aetna Cas. &amp; Surety Co.</i> 50 Cal.App. 4th 329 (1996) .....	5, 6
<i>Continental Ins. Co. v. Lexington Ins. Co.</i> , 55 Cal.App.4th 637 (1997) .....	6
<i>Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.</i> , 130 Cal.App.4th 1078 (2005) .....	9, 10
<i>Four Star Electric, Inc. v. F&amp;H Construction</i> , 7 Cal.App.4th 1375 (1992) .....	8
<i>General Star Indemnity Co. v. Superior Court</i> , 47 Cal.App.4th 1586 (1996) .....	6
<i>Gribaldo, Jacobs, Jones &amp; Associates v. Agrippina Versicherungen A G.</i> 3 Cal.3d 434 (1970) .....	9
<i>Hamilton v. Maryland Casualty Co.</i> , 27 Cal.4th 718 (2002) .....	11, 12

**TABLE OF AUTHORITIES**  
(continued)

<i>J.B. Aguerre, Inc. v. American Guarantee &amp; Liability Ins. Co.,</i> 59 Cal.App. 4th 6 (1997) .....	11
<i>Louisville Title Ins. Co. v. Surety Title &amp; Guar. Co.,</i> 60 Cal. App. 3d 781 (1976) .....	8
<i>Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.</i> 126 Cal.App.3d 593 (1981) .....	5, 6, 7, 10
<i>Patent Scaffolding Co. v. William Simpson Constr. Co.,</i> 256 Cal.App.2d 506 (1967) .....	9
<i>St. Paul Fire &amp; Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.,</i> 101 Cal.App.4th 1038 (2002) .....	9
<i>Superior Gunit v. Ralph Mitzel, Inc.,</i> 117 Cal.App.4th 301(2004) .....	8
<i>Transcontinental Ins. Co. v. Ins. Co. of the State of Pennsylvania</i> 148 Cal.App. 4th 1296 (2007) .....	5
<i>Travelers Cas. &amp; Surety Co. v. Transcontinental Ins. Co.</i> 122 Cal.App.4th 949 (2004) .....	6, 7

**DOCKETED CASES**

<i>Snow v. LensCrafters, Inc., et al.,</i> San Francisco Superior Court Case No. CGC-02-40554 .....	1-4, 8-12
--	-----------

**STATUTES AND RULES**

Fed. Rule Civ. Pro., Rule 12(b)(6) .....	1, 2
Cal. Civ. Code §§56, et seq. ....	1

**MISCELLANEOUS**

Appleman, <i>Insurance Law and Practice</i> (1981) .....	7, 11
Croskey, Heeseman & Popik, <i>Cal. Practice Guide: Insurance Litigation</i> (The Rutter Group, 2003) .....	7
Croskey, Heeseman & Popik, <i>Cal. Practice Guide: Insurance Litigation</i> (The Rutter Group, 1997) .....	11
Schwarzer, Tashima & Wagstaffe, <i>Cal. Prac. Guide: Fed. Civ. Pro. Before Trial</i> (The Rutter Group, 1993) .....	4

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on January 29, 2008, at 1:00 p.m., in Courtroom 3 of the United  
 4 States District Court, Northern District of California, located at 1301 Clay Street, 3<sup>rd</sup> Floor, Oakland,  
 5 California, before the Honorable Sandra Brown Armstrong, Judge presiding, Defendant, Counter-  
 6 Claimant and Cross-Claimant, WESTCHESTER FIRE INSURANCE COMPANY ("Westchester Fire")  
 7 will and hereby does move, pursuant to Fed. Rule Civ. Pro., Rule 12(b)(6), for an Order dismissing the  
 8 Second and Third Claims for Relief of the First Amended Complaint (the "FAC") filed by Plaintiffs,  
 9 LENSRAFTERS, INC. and EYEXAM OF CALIFORNIA, INC. (hereinafter collectively the  
 10 "Plaintiffs" or "LensCrafters"). This Motion is made on the grounds that the Second and Third Claims  
 11 for Relief of the FAC fail to state a claim upon which relief can be granted.

12 Accordingly, moving party, Westchester Fire moves for entry of the concurrently submitted  
 13 Proposed Order dismissing the Second and Third Claims For Relief of the FAC and prohibiting  
 14 Plaintiffs from further amending their Complaint to re-allege said claims unless and until the  
 15 prerequisites to the relief Plaintiffs seek therein have been met. This Motion is based on this Notice of  
 16 Motion and Motion, the Memorandum of Points and Authorities filed herewith, and upon all of the  
 17 pleadings and papers on file herein, together with any oral argument to be made at the hearing.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **1. STATEMENT OF FACTS**

20 This action is an insurance coverage dispute among LensCrafters and the Defendant insurers  
 21 concerning Defendants' purported obligation to indemnify LensCrafters with respect to a lawsuit filed  
 22 against LensCrafters, *Snow v. LensCrafters, Inc., et al.*, San Francisco Superior Court Case  
 23 No. CGC-02-40554 ("*Snow*"). The *Snow* complaint seeks to certify a class of consumers and alleges  
 24 that LensCrafters violated certain California statutes, including the California Confidentiality of Medical  
 25 Information Act, Cal. Civ. Code §§56, et seq.

26 LensCrafters commenced this lawsuit on May 25, 2007. Plaintiffs' original complaint, as well as  
 27 their FAC, alleged a First Claim for Relief for declaratory relief regarding the duty to indemnify with  
 28 respect to the *Snow* action. Westchester Fire filed an Answer to LensCrafters' original complaint.

Further, Westchester Fire filed a counter-claim and a cross-claim, seeking a declaration that Westchester Fire has no duty to indemnify LensCrafters with respect to the *Snow* action, or alternately, if the Court finds a duty to indemnify, a declaration regarding allocation of liability among the other LensCrafters insurers.

The *Snow* action remains pending in the San Francisco Superior Court. The matter has not yet proceeded to trial, let alone to judgment. Notwithstanding, LensCrafters sought and was granted leave to file a First Amended Complaint (the "FAC") to add a Second Claim for Relief for breach of contract against the defendants based on an alleged duty to indemnify and settle the *Snow* Action and a Third Claim for Relief for breach of the implied covenant of good faith and fair dealing for alleged failure to settle the *Snow* action. LensCrafters filed its FAC adding those two claims for relief on October 2, 2007. Westchester Fire has responded to the FAC by bringing this Motion to Dismiss the latter two Claims for Relief under Fed. Rule Civ. Pro., Rule 12(b)(6).

## **2. ISSUES TO BE DECIDED**

By this Motion to Dismiss, the Court is requested to address the following issues:

1. Does an excess insurer have any duty to settle or indemnify before all applicable underlying insurance has been exhausted?
2. Can an insured allege breach of a present contractual duty to settle where the insured has paid no settlement nor suffered entry of any adverse judgment, much less an excess judgment?
3. Can a plaintiff that admits that it has suffered no actual loss to date recover for alleged breach of a duty to indemnify?
4. Can a plaintiff recover for alleged tortious breach of an alleged duty to settle where, to date, no liability has been imposed and no court has ordered that damages be paid?

Moving party, Westchester Fire respectfully submits that under the well established California case law discussed, *infra*, these questions can only be answered in the negative.

## **3. PERTINENT FACTUAL ALLEGATIONS**

With one significant exception applicable here (conclusory allegations, discussed, *infra*), in considering a Rule 12(b)(6) motion to dismiss, the Court accepts the allegations in the complaint as true. *Moody v. Liberty Life Assurance Co.*, 2007 U.S. Dist. LEXIS 32837, \*7 (N.D. Cal., April 19, 2007),

1 citing *Shwarz v. United States*, 234 F.3d 428, 435 (9<sup>th</sup> Cir. 2000) and *Pareto v. FDIC*, 139 F.3d 696, 699  
 2 (9<sup>th</sup> Cir.1998). Here, the FAC admits the following facts (all paragraph, page and line references are to  
 3 the FAC):

4 • Westchester Fire issued an excess umbrella policy for the period 2/1/ 2001- 2/1/2002,  
 5 which is alleged to be "excess to the Markel Policy [and] follows form to that policy..." (¶ 24; p.6:24-25)  
 6 which, in turn, is alleged to be excess of an underlying Liberty Mutual policy (¶ 23; p.6:14-20), the latter  
 7 being described as one of several commercial general liability policies (¶ 16; p. 4:9-26).

8 • Westchester Fire issued four commercial umbrella policies for consecutive annual periods  
 9 from 2/1/2002 to 2/1/2006, which are "in excess of the retained limit per occurrence and in the  
 10 aggregate." (¶25; p. 1-10).

11 Conspicuously absent from the FAC, however, is any allegation that either the insurance  
 12 underlying the Westchester Fire Excess Umbrella Policy (e.g., the Markel and Liberty Mutual policies  
 13 for 2/1/01-2/1/02) or the "retained limit" underlying each of the four Westchester Fire commercial  
 14 umbrella policies have been exhausted to date by payment of settlements or judgments (or otherwise).

15 The FAC further admits the following in its general allegations, incorporated by reference into  
 16 the Second and Third Claims for Relief which are the subject of this Motion:

17 • LensCrafters' claims for indemnity alleged in a prior coverage action against Liberty  
 18 Mutual brought in the within District Court (Case No. C 04-1001 SBA; ¶30, p. 8:7-13) "were dismissed  
 19 without prejudice on the grounds that they were **unripe** for adjudication at that time **because the *Snow***  
 20 **Action was still being litigated"** (¶ 32; p. 8:19-21; emphasis added).

21 • Notwithstanding the above admission as to past lack of ripeness "because the *Snow*  
 22 Action was still being litigated" (*Id.*), the FAC has added such indemnity claims while at the same time  
 23 admitting that the *Snow* Action is still being litigated as of this very date. See, e.g. ¶ 27, p. 7:21-22  
 24 (referring to the Second Amended Complaint in *Snow* as "the current operative complaint"); ¶ 37, p.  
 25 9:16-19 (alleging that the defendants' purported actions "has prevented the settlement of the *Snow*  
 26 Action."); and ¶ 38, p. 9:25-26 (alleging LensCrafters is being "exposed to further litigation...").

27 • No final settlement in *Snow* has been reached, much less paid to date, by LensCrafters (or  
 28 by any other party). See, e.g., ¶ 35, p. 9:6-7 (alleging that a further mediation session in *Snow* was held

on July 26, 2007) and ¶ 36, p.9:10 (alleging that “The mediation on July 26 was unsuccessful.”); see also ¶ 37, p. 9:16-19 (alleging that the Defendants’ purported actions have “prevented the settlement of the *Snow* Action.”), ¶ 34, p.10:26-p.11:3 (describing the purported settlement as being “contingent on approval and funding by the defendants”) and ¶ 36, p. 9:10-12 (alleging that the “defendants refused to do so.”).

- No judgment, much less any judgment in excess of policy limits, has been entered to date against LensCrafters in the *Snow* Action. See, e.g., ¶ 38, p.9:25-26 (alleging LensCrafters faces “further litigation and the **risk** of a judgment in excess of policy limits” (emphasis added), rather than actual entry of any adverse judgment).

In its Second Claim for Relief, LensCrafters sets forth a vague and conclusory allegation that defendants have allegedly “deprived LensCrafters of the benefit of their policies, for which substantial amounts in premiums were paid” and concludes that based thereon “LensCrafters has been damaged in an amount that is to be proved at trial.”(¶ 45, p. 11:5-8). However, as explained by *Transphase Systems, Inc. v. So. Cal. Edison Co.*, 839 F.Supp 711, 718 (C.D. Cal. 1993):

“Although the Court must assume that the allegations in a plaintiff’s complaint are true when considering defendants’ motion to dismiss [citation omitted], the Court does not ‘need to accept as true conclusory allegations ... or unreasonable inferences.’ Schwarzer, Tashima and Wagstaffe, Federal Civil Procedure Before Trial, §9:221 at page 9-14.”

See also *Pareto v. FDIC*, *supra*, 139 F.3d at 699 (“conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss [citations].”)

In particular, the *Transphase* Court compared and contrasted plaintiff’s conclusory allegation at issue there (the defendants’ market power in the relevant product market in an anti-trust case) with plaintiff’s specific factual allegations directly contradicting the former (that the defendant utilities basically did nothing to supply the resources at issue to the relevant product market). *Id.*, 839 F.Supp. at 718. The *Transphase* court thereby concluded that the complaint failed to plead an actionable claim under the federal anti-trust statutes at issue. *Id.*

Here, Plaintiffs’ conclusory allegation that they have been “damaged” by (allegedly) being deprived of “the benefit of their policies” (¶ 45 of the FAC, *supra*) must be compared and contrasted



1 with their specific factual allegations, which directly contradict the former. As aforesaid, the FAC fails  
 2 to allege that LensCrafters has suffered an adverse judgment, much less any judgment in excess of its  
 3 policies' limits, or that it has paid any settlement to date. See discussion of ¶¶ 34-38 of the FAC, *supra*.

4 As further discussed, *infra*, these factual admissions, contradictions by specific allegations of  
 5 conclusory allegations, and omissions of fact render LensCrafters' FAC fatally defective.

#### 6 **4. DISCUSSION**

##### 7 **A. No Duty To Indemnify Arises Under An Excess Policy Unless And** 8 **Until All Applicable Underlying Insurance Has Been Exhausted By** 9 **Payment Of Settlements Or Judgments**

10 There is a very significant difference in California as to the duties of primary versus excess  
 11 insurers. As explained by *Transcontinental Ins. Co. v. Ins. Co. of the State of Pennsylvania*, 148  
 12 Cal.App. 4th 1296, 1304 (2007), citing *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126  
 13 Cal.App.3d 593, 597-598 (1981): "Primary coverage is insurance coverage whereby, under the terms of  
 14 the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability.  
 15 ..... [¶¶] "Excess" or secondary coverage is coverage whereby, under the terms of the policy, liability  
 16 attaches only after a predetermined amount of primary coverage has been exhausted." [italics & fn.  
 17 omitted]

18 The court in *Community Redevelopment Agency v. Aetna Cas. & Surety Co.*, 50 Cal.App. 4th  
 19 329, 339 (1996) cited *Olympic Ins. v. Employers Surplus Lines*, *supra*, as "The leading California case"  
 20 as to the differences between primary and excess policies. The *Community Redevelopment* Court, 50  
 21 Cal.App.4th at 339, explained that in *Olympic Insurance*:

22 The court held that since *all* of the primary insurance had not been exhausted by the settlement,  
 23 the excess insurer had no obligation to provide a defense **or contribute to the settlement**. It did  
 24 not matter that the primary policy to which the secondary policy had been specifically excess had  
 25 itself been exhausted. "A secondary policy, by its own terms, does not apply to cover a loss until  
 26 the underlying primary insurance has been exhausted. *This principle holds true even where there*  
 27 *is more underlying primary insurance than contemplated by the terms of the secondary policy.*"  
 28 (*Id.*, at p. 600 [original italics by the *Community Redevelopment* Court; all other emphases  
 added].)

1 See also *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994), quoting *Olympic*  
 2 *Insurance, supra*, 126 Cal.App.3d at 599 ("Liability under [an excess] policy will not attach until all  
 3 primary insurance is exhausted ...").

4 For purposes of analysis of the exhaustion of underlying insurance requirement, "umbrella" and  
 5 "excess" policies are functionally treated the same. As explained by *Continental Ins. Co. v. Lexington*  
 6 *Ins. Co.*, 55 Cal.App.4th 637, 647 (1997), "Where an umbrella policy is involved, a leading  
 7 commentator has written: '[U]mbrella coverages, almost without dispute, are regarded as true excess  
 8 over and above any type of primary coverage, excess provisions arising in any manner, or escape  
 9 clauses.' 8A Appleman, *Insurance Law and Practice* §4909.85, at 453-54 (1981)." Moreover, as  
 10 explained by *Community Redevelopment, supra*, 50 Cal.App. 4<sup>th</sup> at 339: "It is settled under California  
 11 law that an excess or secondary policy does not cover a loss, nor does any duty to defend the insured  
 12 arise, until *all* of the primary insurance has been exhausted (see *Iolab Corp. v. Seaboard Sur. Co.* (9th  
 13 Cir. 1994) 15 F.3d 1500, 1504.)" (Original italics.)

14 As aforesaid, the FAC alleges that Westchester Fire issued an excess umbrella policy, excess to  
 15 Markel's policy, which, in turn is alleged to be excess of a Liberty Mutual Policy (FAC ¶¶ 24, 23, and  
 16 16, *supra*). The FAC also alleges that Westchester Fire issued commercial umbrella policies, each excess  
 17 of a "retained limit" (albeit unspecified). The FAC alleges that during each of the policy periods that the  
 18 Westchester Fire umbrella policies were in effect (from 2/1/2002 to 2/1/2006; FAC ¶ 25, *supra*), another  
 19 carrier, Liberty Mutual had issued commercial general liability policies, with identical policy periods.  
 20 See FAC ¶ 16, p.4:19-26. Thus, it is clear from reading these allegations together that there was  
 21 underlying primary insurance beneath each of the Westchester Fire umbrella policies.

22 But even assuming, *arguendo*, that Plaintiffs's allegation of a "retained limit" beneath each  
 23 Westchester Fire umbrella policy was meant to refer to a self-insured retention ("S.I.R."), as opposed to  
 24 an underlying policy, courts have recognized that a policy issued above an S.I.R. is considered to be an  
 25 excess policy. See, e.g., *Pacific Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1276-1277  
 26 (9<sup>th</sup> Cir. 1998), applying California law; *General Star Indemnity Co. v. Superior Court*, 47 Cal.App.4th  
 27 1586, 1593 (1996).

28 As explained by *Travelers Cas. & Surety Co. v. Transcontinental Ins. Co.*, 122 Cal.App.4th 949,

1 952, Fn. 3 (2004), "'Primary coverage is "exhausted" when the primary insurers pay their policy limits in  
2 settlement or to satisfy a judgment against the insured.' [citing Croskey et al., *Cal. Practice Guide:*  
3 *Insurance Litigation* (The Rutter Group 2003) ¶¶ 8:86, pp.8-44 & 8-45]." Exhaustion of underlying  
4 insurance may also be achieved by payment of a settlement by the underlying insurers. See *County of*  
5 *Santa Clara v. U.S.F. & G. Co.*, 868 F.Supp. 274, 278 (N.D. Cal. 1994) ("In order to constitute a valid  
6 exhaustion of primary coverage ... the payment must be made to satisfy an obligation arising out of either  
7 an adjudication or a compromise of a third party claim.").

8 As explained by *County of Santa Clara v. U.S. Fid. & Guar. Co.*, *supra*, 868 F. Supp. at 277,  
9 California law is clear that "'[all] primary insurance must be exhausted before liability attaches under a  
10 secondary policy'", citing *Iolab, supra*, 15 F.3d at 1505, quoting *Olympic Ins. v. Employers Surplus*  
11 *Lines, supra*, 126 Cal. App. 3d at 599. *County of Santa Clara* further explained that primary insurance  
12 underlying an excess policy can only be properly exhausted by payment of a settlement or judgment that  
13 actually resolves the third party claim ( "primary insurer validly exhausts its indemnity limits when it  
14 pays a settlement or judgment resolving third party claims." *Id.*, at 277). *County of Santa Clara* further  
15 recognized that it is only when such underlying insurance is properly exhausted that any duty of an  
16 excess carrier may be triggered. *Id.* ("the **payment** of the settlement or judgment then triggers excess  
17 coverage"; emphasis added). Significantly, LensCrafters does not and cannot truthfully allege that there  
18 has been any payment of the contingent "settlement", much less any payment exhausting underlying  
19 insurance required in order to trigger any claimed duty under the Westchester Fire excess umbrella or  
20 umbrella policies.

21 Accordingly, no duty has yet arisen either under Westchester Fire's excess umbrella policy or its  
22 umbrella policies. As was explained over 25 years ago, "liability under a secondary policy will not attach  
23 until all primary insurance is exhausted...". *Olympic Ins. v. Employers Surplus Lines, supra*, 126  
24 Cal.App.3d at 600. LensCrafters' attempt to fasten liability upon an excess carrier, Westchester Fire, in  
25 the absence of any allegation that any, let alone all of the underlying insurance has been exhausted, must  
26 therefore fail.

27 //

28 //

**B. LensCrafters Fails To Allege Breach of Any Present Contractual Duty By Westchester Fire**

LensCrafters' FAC alleges, in paragraph 41 of the second count, that the Defendants breached "their duty to indemnify LensCrafters by refusing to agree to fund the settlement of the *Snow* Action." As discussed, *supra*, the FAC has failed to allege the requisite element of an excess carrier's duty, namely exhaustion of all applicable underlying insurance. But even assuming, *arguendo*, LensCrafters had been able to truthfully allege same (which it cannot), their FAC would still be fatally defective as it fails to allege another requisite element for a breach of indemnity claim - an actual loss.

As explained by *Four Star Electric, Inc. v. F&H Construction*, 7 Cal.App.4th 1375, 1379 (1992), the elements of a breach of contract of indemnity are "the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained". In particular, a claim for indemnity is not ripe unless and until the liability is incurred - i.e, entry of a judgment or actual payment of a settlement. As aforesaid, LensCrafters fails to allege the latter, alleging only that it faces "the **risk** of a judgment in excess of policy limits (FAC ¶ 38, p.9:25-26; emphasis added). In a decision that could just as easily have addressed LensCrafters argument (that "risk" of liability supposedly equates with actual loss), the Court in *Superior Gunitite v. Ralph Mitzel, Inc.*, 117 Cal.App.4th 301, 312-313 (2004) stated:

One might argue if the requirement to pay is a probability, that liability might be included in damages. Yet, our Supreme Court has noted, in the context of indemnity, that an indemnitor is not obligated for a claim made against an indemnitee until the indemnitee has incurred an actual loss by having paid the claim. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110) [other citations and internal quotes omitted].

The *Superior Gunitite* Court, 117 Cal.App.4th at 312, also observed that "California law suggests that the mere possibility that one will be required to pay damages to a third party does not warrant even nominal damages" for an alleged breach of contract. See also, *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 811 (1976) ("Although it is true that the word 'claim' connotes an assertion of a legal right and includes within its meaning a money demand, an indemnitor is not liable

1 for a claim made against the indemnitee until the indemnitee suffers actual loss by being compelled to  
 2 pay the claim. [Citations omitted.]); *Gribaldo, Jacobs, Jones & Associates v. Agrippina*  
 3 *Versicherungen A G*, 3 Cal.3d 434, 447 (1970) ("an indemnitor is not liable for a claim made against the  
 4 indemnitee until the indemnitee suffers actual loss by being compelled to pay the claim [citations  
 5 omitted].")

6 Here, LensCrafters does not and cannot allege actual loss from "being compelled to pay the  
 7 claim" (*Id.*). No judgment has yet been entered in the *Snow* action nor has any settlement been actually  
 8 paid, as LensCrafters readily admits in its FAC. See, e.g., ¶ 38 of the FAC admitting that an actual  
 9 judgment has not yet been entered against LensCrafters, and alleging, instead, that LensCrafters faces  
 10 "further litigation" and "the risk of a judgment..."(emphasis added); ¶ 3 of the FAC admitting that the  
 11 "settlement" is "contingent on approval and funding by defendants" (emphasis added). Further,  
 12 LensCrafters fails to allege in its FAC that it, or anyone else, has paid the contingent "settlement" to  
 13 date.

14 Neither a "contingent" settlement nor the "risk" of a future judgment constitute an extant, actual  
 15 loss which would support a breach of contract claim under the authorities cited, *supra*. As such, the  
 16 Second Claim for Relief, and the Third Claim for Relief upon which it is premised, must fail.

### 17 **C. LensCrafters Fails To Allege The Requisite Element of Actual Damages**

18 In *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.*, 130 Cal.App.4th 1078, 1088  
 19 (2005) the court recognized that an insured cannot maintain a cause of action for breach of contract  
 20 absent resulting damages. See also *Patent Scaffolding Co. v. William Simpson Constr. Co.*, 256  
 21 Cal.App.2d 506, 511 (1967) ("A breach of contract without damages is not actionable [citation  
 22 omitted].") Absent an allegation of actual monetary loss, LensCrafters cannot maintain a claim for  
 23 breach of contract. See *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.*,  
 24 101 Cal.App.4th 1038, 1060 (2002) ("An essential element of a claim for breach of contract is damages  
 25 *resulting from the breach* [original italics; citations omitted].") Because it cannot allege that it incurred  
 26 any damages, as it has not paid anything to settle the *Snow* Action, even if LensCrafters had adequately  
 27 alleged breach of a current contract obligation, its claim for breach of contract would still fail.

28 The only purported "damages" LensCrafters alleges in support of its Second Claim for Relief for

1 alleged breach of contract is that its insurers have allegedly deprived LensCrafters of “the benefit of their  
 2 policies, for which substantial amounts in premiums were paid” and it “has been damaged in an amount  
 3 that is to be proved at trial.” (¶ 45 of the FAC). These conclusory allegations of damages are  
 4 contradicted by LensCrafters’ factual allegations, which admit that there has been no finding of liability  
 5 against LensCrafters to date (only that it faces the “risk of a judgment ...”; ¶ 38 of the FAC, p. 9:25-26),  
 6 and that the *Snow* action has not settled and remains pending (see ¶ 37 of the FAC, p. 18-19, alleging  
 7 that Defendants have “prevented the settlement of the *Snow* Action...”).

8 In particular, the mere “risk” of a future judgment is not a legally compensable item of “damage”.  
 9 See, e.g., *Emerald Bay Community Assn.*, *supra*, 130 Cal.App.4th at 1096 (“plaintiff needed to establish  
 10 actual financial loss, not merely a potential that it may suffer a loss sometime in the future [citations  
 11 omitted].”)

12 LensCrafters attempts to remedy the absence of any factual allegations of actual loss in its FAC  
 13 by raising the contention, in the Revised Case Management Conference (“CMC”) statement that it is  
 14 supposedly incurring additional litigation costs in the *Snow* action. However, these allegations do not  
 15 appear in the FAC. Moreover, as an excess insurer, Westchester Fire’s policies are not triggered in the  
 16 first instance as LensCrafters has failed to allege the exhaustion of underlying insurance, which is a  
 17 prerequisite to triggering any duty under an excess policy. See *County of Santa Clara*, *supra*, 868 F.  
 18 Supp. at 277; *Olympic Ins. Co.*, *supra*, 126 Cal. App. 3d at 600.

19 LensCrafters does not and cannot allege any facts showing actual loss from alleged breach of  
 20 contract in its FAC. As such, its claim for breach of contract is fatally defective.

21 **D. LensCrafters Fails To Allege A Claim For Breach of The Duty To Settle**

22 LensCrafters alleges as part of its Second Claim for Relief a purported breach of the duty to  
 23 settle. LensCrafters has also alleged a Third Claim For Relief in its FAC for alleged “bad faith” failure to  
 24 settle. LensCrafters asserts these claims even though LensCrafters admits in its own FAC that the *Snow*  
 25 action has not proceeded to trial and that no excess judgment has been entered to date. See, e.g. ¶ 38 of  
 26 the FAC (incorporated into the Second and Third Claims for Relief) which alleges that “Defendants  
 27 actions have exposed LensCrafters to *further* litigation and the *risk* of a judgement in excess of policy  
 28 limits.” (Emphases added). In other words, the premise for LensCrafters claims for alleged breach a duty



1 to settle is the mere possibility of a future excess judgment, and not the entry of any actual excess  
 2 judgement. This admission renders these Claims in the FAC defective. Moreover, as LensCrafters  
 3 cannot truthfully allege that *Snow* has proceeded to an actual trial followed by entry of an excess  
 4 judgment, the defect is fatal.

5 The entry of an actual (as opposed to a hypothetical) judgment in excess of policy limits  
 6 following an actual trial on the merits is a prerequisite in California to bringing an action for breach of  
 7 an insurer's duty to settle. See, e.g., *Hamilton v. Maryland Casualty Co.*, 27 Cal.4th 718, 725 (2002).  
 8 The reason for this rule is that entry of an excess judgment following trial is required to establish the  
 9 insurer's liability to the injured party and the amount of damages before any alleged "bad faith failure to  
 10 settle" action may be brought against the insurer. As explained by *J.B. Aguerre, Inc. v. American*  
 11 *Guarantee & Liability Ins. Co.*, 59 Cal.App. 4th 6, 13 (1997):

12 "Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 1997) p.  
 13 12:334 rev. # 1, 1996, explains this requirement as follows: "The excess judgment is necessary to  
 14 establish both the insured's liability to the injured party and the amount thereof for damages  
 15 purposes in the subsequent 'bad faith' action against the insurer. After all, the insurer's refusal to  
 16 settle may prove correct if a defense verdict is obtained or plaintiff's verdict comes in for less  
 17 than policy limits."

18 See also *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 827 (9<sup>th</sup> Cir. 2003, applying California law).  
 19 (recognizing that only if a trial results in an excess judgment would the insured have the remedy of  
 20 pursuing an action against the insurer for alleged failure to settle.)

21 Moreover, the FAC is utterly silent as to any defense costs having been paid by LensCrafters in  
 22 the underlying *Snow* Action as a result of any alleged failure to settle. The only even remotely related  
 23 allegation LensCrafters makes as to attorneys' fees is in ¶ 52 of the Third Claim for Relief (for alleged  
 24 tortious breach), which is in reference to so-called *Brandt*<sup>1</sup> fees incurred for "obtaining coverage under  
 25 defendants' policies" (*Id.*, at p.14:3-4 of the FAC). However, there is no mention of *Brandt* fees or any  
 26 other attorneys fees **as damages** alleged in the Second Claim for Relief for alleged breach of contract.  
 27 Further, Plaintiffs cannot bootstrap such *Brandt* fees to state a claim for tortious breach of the duty to  
 28

<sup>1</sup> *Brandt v. Superior Court*, 37 Cal.3d 813 (1985).

1 settle in their Third Claim for Relief where the requisite element of such a claim does not exist - i.e.,  
 2 lack of an excess judgment entered to date, as discussed, *supra*. As LensCrafters does not allege, and  
 3 cannot truthfully allege the entry of an excess judgment following actual trial in *Snow*, LensCrafters'  
 4 Second Claim for Relief, insofar as based on alleged contractual breach of a duty to settle, and its Third  
 5 Claim for Relief for alleged tortious breach of such duty are defective as a matter of law.

6 **E. Granting LensCrafters Further Leave To Amend Would Be Futile**

7 As discussed, *supra*, entry of a judgment in excess of an insureds' coverage limits following  
 8 actual trial is a pre-requisite to bringing a "bad faith" failure to settle case. *Hamilton, supra*, 27 Cal.4th  
 9 at 725. LensCrafters cannot truthfully allege that the *Snow* action has proceeded to an actual trial, much  
 10 less that an excess judgment resulted. To the contrary, LensCrafters admits in its FAC that the *Snow*  
 11 action remains pending and that no judgment, excess or otherwise, has been entered to date (see, e.g.,  
 12 paragraph 38 of the FAC, referring to "further litigation" in *Snow* and "the risk of a judgment in excess  
 13 of policy limits; emphasis added).

14 As such, any further amendment to the Second and Third Claims For Relief for, respectively,  
 15 alleged breach of contract and breach of the implied covenant of good faith and fair dealing would be  
 16 futile, as there is no legal basis for same at the present time.


17 **5. CONCLUSION**

18 For all of the reasons stated above, Westchester Fire respectfully urges the Court to grant the  
 19 within Motion to Dismiss the Second and Third Claims for Relief of Plaintiffs' FAC, without leave to  
 20 Plaintiffs to further amend their Complaint to re-allege said claims unless and until the prerequisites to  
 21 the relief Plaintiffs seek, discussed, *supra*, have been met.

22 Respectfully submitted.

23 DATED: October 19, 2007

HARRIS, GREEN & DENNISON  
 A Professional Corporation

24  
 25 By   
 26 ROBERT D. DENNISON, ESQ.  
 27 GARY L. GREEN, ESQ.  
 28 Attorneys for Defendant, Counter-Claimant and  
 Cross-Claimant, WESTCHESTER FIRE  
 INSURANCE COMPANY



**PROOF OF SERVICE**

I, SHIRLEY AOKI, am employed in the aforesaid county, State of California: I am over the age of 18 years and not a party to the within action: my business address is 5959 West Century Boulevard, Suite 1100, Los Angeles, California 90045.

On October 19, 2007, I served the following document described as:

**WESTCHESTER FIRE INSURANCE COMPANY'S MOTION TO DISMISS THE SECOND AND THIRD CLAIMS FOR RELIEF OF PLAINTIFFS' FIRST AMENDED COMPLAINT [F.R.C.P. Rule 12(b)(6)]**

**VIA THE UNITED STATES DISTRICT COURT ELECTRONIC FILING SERVICE** on interested parties in this action set forth below:

Richard DeNatale, Esq.  
Celia M. Jackson, Esq.  
Heller Ehrman LLP  
333 Bush Street  
San Francisco, CA 94104-2878  
Tel.: (415) 772-6000 Fax: (415) 772-6268  
Email: [richard.denatale@hellerehrman.com](mailto:richard.denatale@hellerehrman.com)  
[celia.jackson@hellerehrman.com](mailto:celia.jackson@hellerehrman.com)

Attorneys for Plaintiffs, Lenscrafters, Inc.,  
Eyexam of California, Inc.

Terrence R. McInnis, Esq.  
Ross, Dixon & Bell, LLP  
5 Park Plaza, Suite 1200  
Irvine, CA 92614  
Tel.: (949) 622-2700 Fax: (949) 622-2739  
Email: [nexley@rdblawn.com](mailto:nexley@rdblawn.com)

Attorneys for Defendant,  
Executive Risk Specialty Insurance Company

Alex F. Stuart, Esq.  
Willoughby, Stuart & Bening  
Fairmont Plaza  
50 West San Fernando, Suite 400  
San Jose, CA 95113  
Tel.: (408) 289-1972 Fax: (408) 295-6375  
Email: [afs@wshaw.net](mailto:afs@wshaw.net)

Attorneys for Defendant,  
Liberty Mutual Fire Insurance Company

**SERVICE LIST CONTINUED**

Mark Craig Goodman, Esq.  
Amy Rose, Esq.  
Squire, Sanders & Dempsey, L.L.P.


Attorneys for Defendants,  
U.S. Fire Insurance Company

One Maritime Plaza, Suite 300  
San Francisco, CA 94111-3492  
Tel.: (415) 954-0289 Fax: (415) 393-9887  
Email: [mgoodman@ssd.com](mailto:mgoodman@ssd.com)  
[arose@ssd.com](mailto:arose@ssd.com)

Chip Cox, Esq.  
Attorney at Law  
465 California Street, Suite 500  
San Francisco, CA 94104  
Tel.: (415) 397-2222 Fax: (415) 397-6392  
Email: [chipc@longlevit.com](mailto:chipc@longlevit.com)

Attorney for Defendant,  
Markel American Insurance Company

Executed on October 19, 2007, at Los Angeles, California. I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
SHIRLEY AOKI